Before the
Federal Communication Commission 20554

In the Matter of	)	
	)	
Implementation of Section 4(g) of the	)	
Cable Television Consumer Protection	)	MM Docket No. 93-8
and Competition Act of 1992	)	
	)	
Home Shopping Station Issues	)	

Comments of the

Electronic Retailing Association

Bill McClellan
Vice President of Government Affairs
Electronic Retailing Association
200 North 14th Street
Suite 300
Arlington VA 22201
Phone: (703) 908-1032
Fax: (703) 841-1860
E-mail: bmcclellan@retailing.org

July 18, 2007

Before the
FEDERAL COMMUNICATIONS COMMISSION

In the Matter of:	)	
	)	
Implementation of Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992	)	MB Docket No. 93-8
	)	
Home Shopping Station Issues	)	

COMMENTS OF THE ELECTRONIC RETAILING ASSOCIATION

The Electronic Retailing Association ("ERA") appreciates the opportunity to submit these comments on the Federal Communication Commission's ("FCC" or "Commission") Petition for Reconsideration concerning stations that air home shopping programming and their status under section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992.

I. OVERVIEW

ERA is the leading trade association representing electronic retailers - marketers that promote a diverse range of goods and services to consumers through various electronic media including the television, radio, and the Internet. ERA's membership includes over 400 companies geographically distributed throughout the United States as well as around the world. The membership includes household names like QVC, Home Shopping Network, Jewelry Television, Shop NBC and leading direct response commercial producers, as well as small start-ups and individual entrepreneurs. Membership also encompasses companies that provide

critical support services to electronic retailers, including many major tele-services providers, fulfillment houses, and media buyers.

In broad terms, ERA believes that the Commission correctly concluded in the Report and Order that television broadcast stations that are used predominantly for the transmission of sales presentations or program length commercials (such as home shopping stations) serve the public interest and therefore qualify for mandatory cable carriage.

II. HISTORICAL REFERENCE

As directed by Congress in Section 4(g) of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act"), the Commission issued a *Notice of Proposed Rulemaking* "to determine whether broadcast television stations that are predominantly utilized for the transmission of sales presentations or program length commercials are serving the public interest, convenience, and necessity" deserving the same designation of other local broadcast television stations with mandatory must carry cable carriage. With few exceptions, the interested parties responding to this request affirmatively asserted that in fact home shopping stations served the public interest.

In July of 1993, the Commission concurred with this majority determining that these stations served the public interest and the Report and Order for Docket 93-8 was adopted. At that time, the Commission determined that "as long as a home shopping broadcast station remains authorized to hold a Commission license, it should be qualified for mandatory [cable] carriage" as "home

shopping stations are serving the pubic interest, convenience, and necessity." The FCC's analysis revolved around three statutory factors incorporated in Section 4 (g) of the Cable Act: public viewing of home shopping stations; competing demand for allocated spectrum to these stations; and home shopping stations role in offering competition to non-broadcast services with similar programming.

The Commission's review of these statutory factors established that home shopping stations experienced significant viewership with the formats continued growth and prosperity dictated by the continuance of this popular support. The FCC also determined it appropriate to only judge the demands of other broadcasters as opposed to those of other services vying for the spectrum in deciding if home shopping stations serve the public interest. As such, the Commission also found that the competing demands for the spectrum where adequately accounted for through the renewing and licensing process. Additionally, the Commission established that these stations played an important role in providing competition for non-broadcast services supplying similar programming.

At that time, a single request for reconsideration was presented to the Commission challenging this ruling with stated legal arguments masking a thinly veiled disdain of "commercial" programming. This petition, prepared by Media Access Project on behalf of the Center for the Study of Commercialism ("CSC") was opposed almost 14 years ago by a number of interested parties and laid dormant until the recent Public Notice seeking comment by the Commission. Comments requested by the current FCC *Public Notice* include: (1) CSC's assertion that the

Commission failed to consider in its public interest analysis the significant amount of commercial programming broadcast by home shopping stations; (2) CSC's assertion that the Cable Act requires the Commission to consider non-broadcast uses in its analysis of competing demands for spectrum; and (3) information on the current status of home shopping programming. As detailed in the following comment, the FCC's initial determination that home shopping stations serve the public interest continues to be the correct assessment and CSC's allegations provide no catalyst for change as was the case 14 years ago.

III. THE ESTABLISHED RECORD IS COMPLETE & ADEQUATE FOR PETITION DENIAL

In its Petition for Reconsideration, CSC did not question the factual record of the docket used to support the Commission's decision. Rather, CSC's Petition addresses questions of whether the Commission inappropriately relied on ex parte matter or applied the wrong legal principles to make its determination that Home Shopping Stations serve in the public interest. These non-factual issues where adequately addressed at the time by interested parties in their Oppositions and lay sufficient foundation to deny CSC's request today. More specifically, there is no compelling need to "update" the record and established precedent can easily remedy the legal a procedural issues raised by CSC leaving no reason for a comprehensive re-evaluation of the FCC's original conclusions or its underlying support.

A. Subjective Evaluation of Programming Content Properly Avoided by the Commission as a Determinant

CSC's request that the Commission regulate the format and content of the live shopping medium because of market failure and therefore public need for protection from "excessive commercialization" was vetted and properly rejected in 1993. There is no basis in the First Amendment for a distinction between classes of broadcasters based upon the type of content they carry. As was the case then, today it is impossible to draw lines of distinction between "commercial" and "entertainment" programming that passes constitutional muster. The widespread

adoption of product placements and tie-in promotions continue to blur the lines between "entertainment" programming and "commercial" programming in today's marketplace making it impossible as well as unconstitutional for the Commission to make value judgments on this basis.

B. The Commission Appropriately Focused on Competing Demands for the Spectrum for Broadcast Uses Only

The Commission's initial determination to focus only on the competing needs of other broadcasters when determining spectrum allocation continues to stand the test of time. Previous comments on this subject where mixed with some, including CSC, arguing Congressional intent of the statute required consideration of non-broadcast use.

However in the 1993 R&O, the Commission stated "by directing the Commission to allow home shopping licensees to develop other broadcast formats if their stations were found not to serve the public interest, Congress contemplated only broadcast use for those channels."

Unhappy with the rejection of its position, the CSC again pressed its contrarian view by petition citing a single post-enactment letter by Representative John Dingle not formally entered into the record during the 1993 proceedings. In its deliberation the Commission conducted both a plain language review of the statute as well as considered contemporaneous comments by both Representative John Dingle and Representative Dennis Eckart and correctly determined that Congressional intent indeed excluded non-broadcast usage of the spectrum.

More importantly, the upcoming transition to DTV will provide a new and important amount of spectrum fro non-broadcast use, including the usage needs of emergency and public safety dwarfing any gains of the re-allocation championed by the CSC's in its interpretation of the act. Further, non-broadcast use would be impractical due to the creation of a significant number of licensing, technical, interference, and enforcement barriers associated with re-allocation of this spectrum. Additionally, the lack of successful challenges denying renewal applications for home shopping formatted stations suggests that there is limited copetition for the spectrum and that its use is in the public interest just as the Commission found in 1993 with respect to the lack of competing applicants.

IV. STATUTE PROHIBITS RECONSIDERATION OR OPENING THE RECORD

While agencies have the innate ability to reconsider past decisions they must do in a timely fashion. Coupled with Congress's express limitation in Section 4(g) of the Cable act that the Commission make a determination "[w]ithin 270 days of enactment of this section" the Commission is prohibited from both revising its original finding or updating the factual record upon which it is based without renewed Congressional authorization.

There is clear legislative intent in other portions of the Cable Act with respect to time limits for rulemaking in other contexts further suggesting Congressional ability to communicate a timetable for this proceeding. As clearly stated in the Cable Act that time period was 270 days from passage for this proceeding. This is an important distinction as the Supreme Court has found an agency's rulemaking authority as "the power to adopt regulations to carry into effect

the will of Congress as expressed by the statute," and has found it "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." With the 270 day time period so clearly expressed reconsideration these 14 long years later cannot be warranted as the authority delegated by Congress has long since expired.

Additionally, the Commission's own rules state "no evidence other than newly discovered evidence, evidence which has become available only since the original taking of evidence, or evidence which the Commission or the designated authority believes should have been taken in the original proceeding" can be added to the record. To date, no new information or evidence meets these stated criteria and as such any attempt to reconsider must be limited to the facts of the existing record.

VI. CONCLUSION

For the foregoing reasons, as a matter of process under the Cable Act, under its administrative duties pursuant to the Administrative Procedure Act, and to be consistent with the constitutional guarantees in the First Amendment, the Commission must affirm its *1993 R&O* and deny the Petition.

Respectfully submitted,

Electronic Retailing Association

By: _____
Barbara Tulipane

President & CEO

Bill McClellan
Vice President of Government Affairs

Electronic Retailing Association
200 North 14th Street
Suite 300
Arlington VA 22201
Phone: (703) 908-1032
Fax: (703) 841-1860
E-mail: bmcclellan@retailing.org

July 18, 2007